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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 252

THE UNITED STATES, PETITIONER,

v.

ARTEMUS C. WELLS ET AL., EXECUTORS OF THE ESTATE OF JOHN W. WELLS, DECEASED, RESPONDENTS.

BRIEF FOR RESPONDENTS.

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MAY IT PLEASE THE COURT:

This is an appeal granted by this Court to the United States from a decision of the Court of Claims holding that respondents were entitled to recover estate taxes in the amount of $83,683.62 exacted of them by the collecting officers of the United States. The respondents are the executors of the estate of John W. Wells, deceased.

Unless otherwise indicated, the italics of this brief are ours.

Opinion of the Court Below.

The opinion of the Court below in this action was rendered by the Court of Claims on April 7, 1930. It is reported in 39 Fed. (2d) 998.

Jurisdiction.

This Court has heretofore granted a writ of certiorari under Section 288 of the Judicial Code (28 U. S. C. A. 129).

The date of the decree of the Court of Claims is April 7, 1930. The petition for certiorari was filed on July 3, 1930. It was granted on October 13, 1930.

Issue in Court Below.

This is an action filed in the Court of Claims by respondents against the United States for the recovery of estate taxes erroneously and illegally collected from them on certain transfers alleged by the Commissioner of Internal Revenue to have been made by the decedent in contemplation of death. The issue in the Court below was whether such gifts were made *in contemplation of death*. The Court found that the gifts were not made in contemplation of death.

Statute Involved.

The statute here involved is Section 402(*c*) of the Revenue Act of 1918, which relates to the Federal estate tax. That section follows:

> "SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all

property, real or personal, tangible or intangible, wherever situated—

"(*c*) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a *bona fide* sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

Statement of the Case.

The material facts appear in the special findings of fact and opinion of the Court below (Rec. 14-37).

Summary of Argument.

We now contend:

1. THE FINDING OF THE COURT OF CLAIMS THAT THE GIFTS WERE NOT MADE IN CONTEMPLATION OF DEATH IS A FINDING UPON EITHER A QUESTION OF FACT OR A MIXED QUESTION OF LAW AND FACT, AND AS SUCH WILL NOT BE DISTURBED BY THIS COURT.

2. THE LOWER COURT DID NOT ERR IN ITS DEFINITION OF THE TERM "CONTEMPLATION OF DEATH".

3. EVEN THOUGH IT BE FOUND BY THE COURT THAT OBJECTION MAY PROPERLY BE MADE TO SOME PORTION OF THE DEFINITION OF THE TERM "CONTEMPLATION OF DEATH", IT WOULD NOT FOLLOW, WE SUGGEST, THAT THE JUDGMENT APPEALED FROM SHOULD BE REVERSED.

These, in the order stated.

The finding of the Court of Claims that the gifts were not made in contemplation of death is a finding upon either a question of fact or a mixed question of law and fact, and as such will not be disturbed by this Court.

Whether a particular gift was made in contemplation of death presents, we suggest, a question of fact, even though it be the ultimate fact to be found. This ultimate fact is to be taken not from any isolated circumstance, but rather from *all* the primary facts and circumstances of the case. The condition of health of the decedent at the time the transfer was made is one of the primary facts to be considered. The business activities of the decedent, his outlook on life, the relationship of the donee to the donor and to the subject-matter of the gifts, the policy and philosophy of the decedent regarding gifts to his children—all facts bearing on the question of the motivating cause of the gifts are to be considered. The Court of Claims is a fact-finding tribunal as well as a Court of law. Seldom indeed, if ever, has this Court reversed the Court of Claims in a case involving only a question of fact or a mixed question of law and fact.

If the finding below that the gifts were not made in contemplation of death be regarded as one of mixed law and fact, the rule enunciated by this Court is that this Court will not disturb the findings of the lower Court. In United States *v.* Swift & Company, 270 U. S. 124, appealed from the Court of Claims, the question at issue related to the authority of certain army officers to bind the United States by contracts for the purchase of meat supplies. Regarding the effect of the findings of the lower Court on that question, this Court said at page 137:

> "It is quite evident from the findings that in the organization and re-organization of the many agencies needed to furnish the supplies of food in Chicago, there were apparent conflicts of jurisdiction and there were orders issued having on their face general application which in fact by the course of business were limited, and all these orders from the War Department and from the Quartermaster's Department were before the court of claims for its consideration. In such a situation the finding of the court of claims that General Kniskern was the representative of the Quartermaster's Department in making these contracts for bacon is either a question of fact or a mixed question of law and fact, and is conclusive on this court."

In support of this statement of the rule, the Court cited United States *v.* Omaha Tribe of Indians, 253 U. S. 275. In that case, which was also appealed from the Court of Claims, the question presented was the liability of the United States under a treaty with the

Indians to make certain expenditures for their benefit. Upon the question involved in the present case, the Court said (p. 281):

> "The allowance for the infirmary is disputed upon the ground that the treaties, fairly construed, gave authority for expending moneys of the Omahas for this purpose, especially the very general language of article 4 of the Treaty of 1854, authorizing the President to expend a part of the fund 'for such beneficial objects as, in his judgment, will be calculated to advance them in civilization' and 'for medical purposes'. We construe the finding, 'This building was not used, and it was not such a building as was contemplated by the treaties', as meaning not that a building of this general character was not contemplated, but that the particular building was not what it ought to have been, and not suitable for the use of the Indians. So construed, it is either a finding upon a mere question of fact, or at most a finding of mixed fact and law where the question of law is inseperable. In the latter case, as in the former, the finding, on familiar principles, is not reviewable."

That there were abundant primary facts to support the finding of ultimate fact of the Court below is, we submit, shown by the special findings of fact and opinion of the lower Court.

We are seeking here to ascertain what was in the mind of the decedent at the time he made the gifts to his children or, as it is sometimes termed, the motivating cause of the transfers. Such motivating cause

may properly be inferred from the decedent's condition of health and from all that he said and did. We take the liberty of calling attention to the following:

1. The age of the decedent was 71 years past in December, 1919, and 72 years past in December, 1920, and January, 1921, when the transfers involved in the present case were made. Except for his father, who died during the Civil War, the decedent's family was a long-lived one. The decedent himself was active in business affairs until after the last of the transfers was made. His business activities continued, in fact, until his last illness, which began in April, 1921. In the 16th Finding of Fact (Rec. 19) it is stated that after he returned home from the hospital in September, 1920, the decedent resumed his normal business activities, which included the management of the business of the J. W. Wells Lumber Company and other business affairs in which he was interested. These activities continued up to the time of his death. He was at the office of the lumber company every day, around and about the plant, doing the work that he had always done, attending to correspondence and similar executive work. This work at the office and plant of the lumber company continued until he went to California on February 3, 1921.

After the decedent returned to California he resumed his normal life there. Entertaining visitors from his home town of Menominee, Michigan, he drove them in his automobile through the congested portions of the city of Los Angeles and around the mountains of that vicinity. Some of these activities are recounted

in the 26th Finding of Fact (Rec. 25). It appears that in February, 1921, the Hamiltons, friends of the decedent, visited Los Angeles where they saw the decedent six times and spent three days with him. They had dinner at his residence; the decedent took them in his automobile around the city and up in the mountains nearby. On these occasions the party would start at 9 or 10 o'clock in the morning, have lunch at 2 or 3 o'clock on the road, and return home about 5 o'clock. Decedent drove the car himself through the congested portions of the city, as well as around and over the mountains. At places on these mountain roads the automobile party, with the decedent at the wheel of the car, traveled roads that ran along a precipice where there was a sheer fall of six or seven thousand feet without any apparent concern on the part of the decedent. Hamilton saw no difference in the decedent's appearance. He was just as "spry" as he ever was and handled the car well. The decedent was also very cheerful.

It stands out clearly in this record that the decedent was an active, vigorous man, unimpaired by disease until April, 1921, the month in which his last illness began.

2. Findings of fact are made in respect of an asthmatic condition from which the decedent suffered during the last few years of his life, but it was also shown by the findings that this condition had nothing whatsoever to do with his death. It is a fact of common knowledge that many people have asthma for a long period of time without apprehension of death therefrom.

The cause of decedent's death is shown definitely to have been ulcerative colitis, an acute infection and inflammation of the lower bowel, accompanied by dysentery. In the Spring of 1920, on the occasion of the first attack of colitis, he was told by California physicians that he was suffering from cancer. Upon receiving this diagnosis, the decedent went at once to Chicago, Illinois, where he entered the Presbyterian Hospital. There he consulted Dr. Ralph Brown, a specialist in bowel diseases, who made a thorough examination of the decedent preliminary to a diagnosis. This was in June, 1920. Dr. Brown diagnosed the trouble as ulcerative colitis and explained to decedent in detail the nature of his ailment (9th Finding of Fact, Rec. 17). Dr. Brown assured the decedent "he would get well" (10th Finding of Fact, Rec. 17). The decedent's trouble yielded to treatment. By the 22nd of September, 1920, he was so improved that he could be and was discharged from the hospital on that date. His condition at that time was thus described: "Though he had not fully at that time recovered, but he did within the next two or three months." His appearance was then normal. He had gained an appreciable amount of weight and was in a fair state of health (14th Finding of Fact, Rec. 19). Throughout the fall and winter of 1920 the decedent's improvement continued so that he became fully able in those months to resume his normal activities. On October 30, 1920, he wrote his son Ralph, who was then in England, as follows (17th Finding of Fact, Rec. 20):

> "I am around about the same as usual. Went to Iron Mountains to see Wells Hallenbeck day

> before yesterday, from there next day to Dunbar and on home. I feel as well as ever, and bowels seem normal, but doctor says I must diet and take Bismuth medicine for awhile and be careful. Gained 6 pounds since I came home. * * *"

Regarding the physical condition of the decedent on February 3, 1921 (which was after all gifts involved in the present case were made), we quote the following evidence taken from the 26th Finding of Fact (Rec. 25):

> "He was vigorous and had an excellent color. He was having, and had had for months then, a normal bowel functioning. He was eating everything and, with the exception of the fact that his asthma had at that time not entirely cleared up, he considered himself well, and I told him that he need have no anxiety whatever about his state of health; that I considered him in excellent condition; that he need have no fears of any recurrence of the ulcerated colitis. As a matter of fact, my statement to him was justified by the fact that since he had left the hospital the preceding September, a matter of practically four months, he had enjoyed as normal a bowel function, I suppose, as the average man."

No clearer statement of what the decedent thought of his own condition could be made than that which appears in the 15th Finding of Fact (Rec. 19). The morning of his return to his Menominee home in September, 1920, he went to the offices of the lumber company. There he saw his son, Artemus Wells. He

told his son he was completely cured of the trouble he had had and that he felt good, but said he was going to be careful what he ate.

In the Fall of 1920 his condition of health was so far improved that he was able to undergo an operation at the Presbyterian Hospital on his nose, designed to clear up the asmathic condition.

Prior to his discharge from the hospital the decedent wrote his son Ralph as follows: "The doctors say I will be absolutely cured if I am careful for two or three months after leaving, and I certainly will be careful after this" (13th Finding of Fact, Rec. 19).

Quoting further from the opinion of the lower Court (Rec. 34):

> "Upon his discharge from the hospital in September he returned to his home in Michigan; assured his son Artemus Wells, who had been in charge of the J. W. Wells Lumber Company during his absence, that he was completely cured of his trouble and that he felt good, but said that 'he was going to be careful of what he ate'. He resumed his normal business activities, was at the office of the Wells Lumber Company every day; attended to his correspondence, worked on his books, and was apparently in his usual health. He visited with his friends as usual and made one or two business trips outside the State."

The conclusion is irresistible that all apprehension of death on the part of the decedent from ulcerative colitis had been removed prior to the pivotal months of December, 1920 and January, 1921.

3. While in California, about the middle of April, 1921, the decedent had a recurrence of ulcerative colitis. The local physician diagnosed the case as ulcerative colitis and so treated the decedent for some weeks. Because the decedent's trouble did not yield to treatment, the physician told him that he feared he might have a cancer, whereupon Mr. Wells telegraphed Dr. Brown that he was coming to Chicago at once. He did so, arriving in Chicago on June 5, 1921. As a result of this second attack of ulcerative colitis, he was a very sick man at the time of his arrival at the hospital. He gradually grew worse, and died as a result of this disease on August 17, 1921. An autopsy, made immediately after his death, confirmed the diagnosis of ulcerative colitis, with no trace of cancer.

Considering all the facts and circumstances, evidencing what the decedent said and did in the fall and winter of 1920-1921, it is, we suggest, not possible to conclude that the decedent's last illness, occurring as it did in April-August, 1921, could have been foreseen by him or anyone else in December, 1919, December, 1920, or January, 1921, when the transfers involved in this case were made.

4. The decedent had a fixed purpose respecting gifts to his five children. As early as 1901 he began making gifts to his children. "He kept a set of books on which he charged to the several children some but not all of the amounts transferred to them. These books of account, which are wholly in the decedent's handwriting, record many items of varying amounts—from a dollar or two to more than $30,000—to represent ad-

vancements by the decedent to his children in 1901 and subsequent years" (4th Finding of Fact, Rec. 15).

In the accounts with the children, the decedent charged each child with 5 per cent interest on the gifts made to him or her, as a step in the equalizing of one with the other (24th Finding of Fact, Rec. 24).

As the children advanced in years—and presumptively in their ability to take care of what was given them—the amounts of the gifts increased. To illustrate: In 1918 he gave to three of the children certain shares of stock in a railway company, charging them collectively on account thereof with $76,380 (7th Finding of Fact, Rec. 16). On December 24, 1919, he gave two of his sons stock of the lumber company, charging them with $103,808. In December, 1920, he decided upon, and took immediate steps to carry out, additional gifts to his children. These, with the gifts made on December 24, 1919, are the transfers involved in the present case. The later gifts (effectuated in January, 1921) represented shares of stock valued at $679,095.

Prior to the equalization of the children by the decedent, he had charged them with advancements in the aggregate amount of $1,063,644 (24th Finding of Fact, Rec. 24). On a financial statement prepared by him and given to a Chicago bank on December 21, 1920, the decedent penned in red ink: "I have made presents to my family of large amounts of stocks and cash for several years. J. W. Wells." In this statement the stocks transferred to the children on December 31, 1920, were not included (20th Finding of Fact, Rec. 22).

The following facts are, we believe, not open to dispute: The policy of the decedent with reference to gifts to his children had been a liberal one for many years prior to his death; this policy found expression in substantial gifts to his children as far back as 1901; it continued down through subsequent years to and including the month of January, 1921; the making of the gifts involved in the present case was entirely consistent with the decedent's policy on this subject, formed many years before his death. At the expense of some repetition, we point out that as late as 1918 the decedent advanced to his children certain shares of stock of a railway company, for which he charged them collectively with $76,380 (7th Finding of Fact, Rec. 16). It has not been claimed by the Commissioner of Internal Revenue that these transfers were made in contemplation of death. Yet, those made in December, 1919, and one year later were merely the expression of a policy adopted and continued through the preceding eighteen years of his life. On this point the Court below said (Rec. 36):

> "The plaintiffs have not only overcome the presumption created by the statute that the transfers were made in contemplation of death but have definitely established the fact, that the immediate and moving cause of the transfers was the carrying out of a policy long followed by decedent in dealing with his children of making liberal gifts to them during his lifetime. He had consistently followed that policy for nearly thirty years and the three transfers in question were a continuation and final consummation of such policy. In the last transfer

such amounts were given to his children as would even them up one with another, in the gifts and advancements made to them.

"That this was the motive which actuated the decedent in making these transfers seems unquestioned. He repeatedly, in letters to his children and in statements to business associates at about the time the transfers were made, gave this as his reason for such transfers."

5. To members of his family and close friends, the decedent explained his policy respecting gifts to his children. For a considerable period of time the decedent was associated in business with the late Senator Stephenson. Mr. Stephenson's policy, it seems, in the matter of gifts to his children, was not liberal. About the time of his (Stephenson's) death, the decedent defined his own policy in unmistakable terms. He said that the proper thing for a man of wealth to do was to give his children substantial sums of money during his lifetime, when he could advise with them as to the proper use they should make of it; that the contrary policy was a great mistake. About this, to one of his friends he said: "I am making distribution from time to time of part of my property to see what my children will do during my lifetime, and I will then know, when my time is up, what I ought to do with the balance" (4th Finding of Fact, Rec. 15).

6. The decedent's son Artemus managed the J. W. Wells Lumber Company when he, decedent, was away from his Menominee home. In December, 1919, he decided to increase the interest of this son Artemus in

that company. He transferred to Artemus at that time 343 shares of the stock of the company, giving also to his eldest son Daniel 73 shares of the same stock. The stock so transferred to the two sons had a value at the time of decedent's death of $103,808. These transfers were included in the taxable estate by the Commissioner of Internal Revenue, although they occurred some four or five months before the first attack of ulcerative colitis. Will it be contended here that the decedent could have foreseen in 1919 that he would in the following April become a sufferer from a serious ailment?

In point of fact, at the time the decedent transferred to his two sons the stock in the J. W. Wells Lumber Company, aside from the asthmatic condition he had been in excellent health for years, and there is not the slightest basis for a contention that he then apprehended his early demise.

7. The findings of fact disclose affirmatively and definitely the motivating cause of the transfers made by the decedent to his children in December, 1920, and January, 1921. There should be no contention on this point. The motivating cause of these transfers was the desire of the decedent to equalize his children, one with the other, in the gifts he had previously made to them. He so wrote his daughter Edna on February 3, 1921. In this letter he said (25th Finding of Fact, Rec. 24):

> "I have been working on my books and evening up all your accounts. Dan, Art, and Ralph have had advances that were more than you and

Florence had and I have equalized one with the other by charging each with what they have had and charging them interest on the account to date, and the inclosed sheet shows what each has had, and how I equalized your a/cs by giving stock to even."

By an early will and also by the will made by the decedent while he was in the hospital in the Summer of 1920, the decedent provided for the equalization after his death of his children in the advances he had made them. An important consideration suggests itself at this point. The decedent had been told immediately prior to his coming to the hospital in June, 1920, that he was suffering from cancer. The effect of this information upon the decedent is to be taken from the following facts:

(*a*) He did not accept the diagnosis but rather sought the advice of a specialist nearer his Michigan home.

(*b*) Before he had received the diagnosis of the specialist, he made a settlement with his wife which, by its terms, became effective upon his death. He also revised his will to accord with the terms of the settlement contract.

(*c*) He made no gifts whatsoever to his children during the interval from the date of the receipt of the diagnosis of the California physician to the date on which he was assured by the Chicago specialist that his trouble was not cancer, but was rather ulcerative

colitis, from which he would recover. So long as he stood in the shadow of the advice of the California physician, he made provisions consistent therewith, viz., a settlement with his wife effective upon his death and the revision of his will. Here was a brief period during which it might be said that he acted in contemplation of death. What he did and what he failed to do during that period throw light upon the ultimate fact to be found in the present case.

(*d*) It was not until all fear of death from cancer had been removed by his restoration to normal health that the decedent decided to equalize his children during his lifetime. Here, he was concerned not with death, but with life and living.

We have, in the findings of fact on these points, a key to the entire situation. So long as the decedent had reason to apprehend his early death, he made provisions consistent with that apprehension. Not until all reason for fear of death in the near future had been removed did he make the gifts of December, 1920, and January, 1921, involved in the present case. The making of these gifts was consistent with his policy respecting advancements to his children inaugurated as far back as 1901.

8. After deducting all transfers, the taxable estate retained by the decedent aggregated $881,314.61. The decedent's annual income from the property retained by him was approximately $50,000 per annum, which was more than sufficient for his needs.

The lower Court did not err in its definition of the term "contemplation of death."

The opinion of the Court below is, we suggest, its own best defense.

In the petition for the writ of certiorari, petitioner quotes one sentence of the opinion and says that it incorrectly defines the term, "contemplation of death". The definition so quoted was this (Rec. 3):

> "Applying these facts to the rule that the term 'contemplation of death' does not mean that general knowledge of all men that they must die, but that there must be a present apprehension from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand, and that such reasonable fear or apprehension must be the direct or animating cause, and the only cause of the transfer, it seems quite clear to us that the transfers in question were not made in contemplation of death." (39 F. (2d) 998, 1011.)

We next quote the specification of errors appearing in the petition for certiorari (Rec. 3):

> "The Court below erred—
>
> "1. In holding that 'contemplation of death', as used in 402(*c*) of the revenue act of 1918 is limited to 'a present apprehension, from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand.'
>
> "2. In holding that 'a transfer made in contemplation of death', as used in section 402(*c*)

of the revenue act of 1918, means a transfer of which a reasonable apprehension of death near at hand is the direct, animating, and only cause.

"3. In giving judgment for the respondents."

The phrase "contemplation of death" is used in the statute to denote a condition of mind existing at the time of the gift. It will not be contended, we assume, that error was made by the Court below in including the words "present apprehension" in the definition.

But was it correct to make part of the definition the clause, "from some existing bodily or mental condition or impending peril"? The words "impending peril" embrace such cases as these: A member of the armed forces of the nation on the eve of battle makes a gift in fear of what may come to him on the morrow; a man condemned to be executed for crime, with the date of the execution fixed, may dispose of his property in contemplation of that event.

In the present case there was no such impending peril, and the words were simply left in the definition which was taken from a number of decisions, to some of which reference will be made in this brief.

We come next to the clause, "from some existing bodily or mental condition". Was it error to so limit the cause of the apprehension? Contemplation of death, as we have said, is in the mind of the decedent. It is a mental state. What, may it be said, is the cause of that mental state in the case of an active man 72 years of age? There can be but one answer: The actual or imagined presence of some mental or bodily disease which will take him away in the near future.

In the large majority of cases death is attributable to mental or bodily disease and, quite naturally, one attributes the cause of death to disease of one or the other class.

The position here taken is fully supported by the regulations of the Bureau of Internal Revenue. The regulations relating to the estate tax in force at the time of the decedent's death are Regulations 37, revised January 21, 1921. We take the following therefrom: "The words 'in contemplation of death' do not refer to the general expectation of death which all persons entertain. A transfer, however, is made in contemplation of death whenever the person making it is influenced to do so by such an expectation of death *arising from bodily or mental conditions,* as prompts persons to dispose of their property to those whom they deem proper objects of their bounty * * *." This definition was continued in substantially the same form in Regulations 63 (under the Revenue Act of 1921), Regulations 68 (under the Revenue Act of 1924), and Regulations 70 (under the Revenue Acts of 1926 and 1928). We quote the definition appearing in Regulations 70, which evidences the present attitude of the Bureau on this subject:

> "The words 'in contemplation of death' do not mean, on the one hand, a general expectation of death such as all persons entertain, nor, on the other, is the meaning limited to an expectation of immediate death. A transfer, however, is made in contemplation of death whereever the person making it is influenced to do so by such an expectation of death, arising from

> bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty. Such a transfer is taxable, although the decedent parts absolutely and immediately with his title to and possession and enjoyment of the property."

"Creating a reasonable fear that death is near at hand"—is this clause properly included in the Court's definition? It will be noted at once that the definition does not limit the contemplation-of-death cases to those where there is an expectation of *immediate* death. It therefore is not inconsistent with the clause "nor is the meaning limited to an expectation of *immediate* death", appearing in Regulation 70. The limitation stated by the Court below is that of an expectation of death, "near at hand".

What is the office of these words in the clause? Manifestly the Court undertook by their use to distinguish between an apprehension of death in the near future and the apprehension that we all have of death whenever it may come. This is entirely apparent from the fact that the Court adopts the following language from the opinion of the Court of Claims in Meyer *v.* United States, 60 Ct. Cls. 474: "If it be said that there need not be a conviction that death is imminent, there must at least be a belief that it is to be expected in the very near future rather than in the usual course of events".

Finally, the second assignment of error points to the clause "that such reasonable fear or apprehension

is the direct or animating cause and the only cause of the transfer * * *". Is this a correct statement of the law?

Nothing in the clause is inconsistent with the regulation of the Bureau of Internal Revenue, above quoted, although the phraseology of the two definitions differ. The Court below uses the words, "direct or animating cause", implying merely a direct, causal relation between the fear of death and the making of the gifts, *i. e.*, the usual relation of cause and effect. The regulations require that the decedent shall be *influenced* to make the transfer by the expectation of death, which is only another way of stating the same relation of cause and effect.

Nor do the regulations state that there may be other influencing causes without taking the case outside of the contemplation-of-death class; but aside from this consideration, the clause under discussion has received repeatedly the approval of the Courts and that of the Board of Tax Appeals, as we shall see presently.

In the case of Hannah M. Spofford, 3 B. T. A. 1016, 1020, the Board of Tax Appeals defined the term "contemplation of death" as follows:

> " 'Contemplation of death', as used in the statute, is an apprehension of death within the reasonably near future, arising from some existing bodily condition, and not the general expectation of death entertained by everyone. Contemplation of death must be the motive prompting the transfer of property in order to subject the transfer of property to the tax. Appeal of Philip T. Starck, 3 B. T. A. 514."

In the case so cited (Philip T. Starck, 3 B. T. A. 514, 519) the Board used this language:

> "Webster's Unabridged Dictionary defines 'contemplation' as the act of looking forward to an event as about to happen; expectation; act of intending, purposing, or considering, hence, intention; consideration; etc.
>
> "An act may well be performed in contemplation of death at some time in the future and yet not be in contemplation of death within the meaning of that phrase as used in the statute. The intention of Congress in the enactment of section 402 of the Revenue Act of 1918 was to provide for the inclusion in the gross estate of the value of any property concerning which the decedent made a transfer, except for a fair consideration in money or money's worth, in contemplation of death within a reasonable time in the near future, as distinguished from the general expectation of death entertained by everyone."

In the case of Phillips, Executor *v.* Commissioner, 7 B. T. A. 1054, 1058, also a contemplation-of-death case, the Board observed:

> "It may be well that when the conveyances in question were made Joseph N. Phillips contemplated death at some time in the future, but men perform acts daily with the knowledge that death may overtake them any moment. Men all wish to accomplish certain things before that fateful day and in that sense things may be done in contemplation of death, but this general and certain knowledge that to all death cometh soon or late is not what is meant by the phrase

'in contemplation of death' as used in the Revenue Act."

The conclusion of the Board in the case of Gimbels, Executors, *v.* Commissioner, 11 B. T. A. 214, 231, was stated as follows:

> "From a consideration of all the facts in this case we are of the opinion that in making the gifts, Gimbel had no expectation, belief or apprehension that his death was near at hand or might occur in the reasonably near future. Inasmuch as the decedent did not have such a belief, expectation or apprehension, we think the gifts were not made in contemplation of death, within the meaning of that phrase as used in the Act."

The meaning of the term "contemplation of death" was also clearly defined by the Board in the case of United States Trust Company, Executor, *v.* Commissioner, 14 B. T. A. 312, 316, in this language:

> "This provision, which is the same in the Revenue Acts of 1918 and 1924, has been before the Board and the courts in many cases and the construction uniformly applied is that by the term 'contemplation of death' is meant an apprehension of death within the reasonably near future from some existing bodily or mental condition, and not the general expectation of ultimate death entertained by everyone, and that such contemplation of death must be the motive which prompted the transfer and without which the transfer would not have been made, in order to include the transferred property in the estate of the decedent subject to tax. Illinois

> Merchants Trust Co., Executor, 12 B. T. A. 818; Isaac Gimbel *et al.*, Executors, 11 B. T. A. 214; Philip T. Starck, Executor, 3 B. T. A. 514; Hannah M. Spofford, Administratrix, 3 B. T. A. 1016; Spencer Borden, Jr., Executor, 6 B. T. A. 255; Anna Serrien, Executrix, 7 B. T. A. 1129; Spreckels *v.* State, 158 Pac. 549; 30 Cal. App. 363; Rea *v.* Heiner, 6 Fed. (2d) 389; Meyer *v.* United States, 60 Ct. Cls. 474."

The same construction of the term appears in somewhat different language in Flannery *v.* Willcutts, 25 Fed. (2d) 951, 953 (C. C. A. 8), where the Court said:

> "We are also in accord with counsel's statement in his brief that the cases 'hold that the thought of death must be the actuating motive without which the gift would not have been made'—adding thereto the qualification that the 'thought of death' as an anticipation of the inevitable which we all realize, is not within the statute, but to be within the statute the thought must arise because of some known infirmity which, it is believed, will likely cause death."

The definition of "contemplation of death" assigned as error by petitioner was really adopted by the Court below from Rea, Executor, *v.* Heiner, Collector, 6 Fed. (2d) 389 (U. S. Dist. Ct., Pa.), from which the following is taken:

> "In Spreckels *v.* State, 30 California App. 363, the court said: 'A reasonable and just view of the law in question is that it is only when the transfers of property by gift are immediately and directly prompted by the expectation of death, that the property so transferred becomes

amenable to the burden, or, as counsel for the respondents with singular aptness stated the proposition: *"It is only when contemplation of death is the motive without which the conveyance would not be made, that a transfer may be subjected to the tax.* That is, the expectation of death must be the direct, specific, and immediate animating cause of the transfer." "

Continuing, the Court said:

"In harmony with these opinions may be cited Conway's estate, 120 N. E. (Ind.) 717; Rosenthal *v.* People, 211 Ill. 306; Trust Company *v.* Stevens, 209 Mass. 373; Commonwealth *v.* Fenley, 189 Ky. 480, and many other cases.

"These principles have been applied with great uniformity in the adjudicated cases, both in the State and Federal Courts. There is a common agreement that the words 'contemplation of death' is not the general knowledge of all men that they must die; that it must be a present apprehension from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand; and that so arising, it must be the direct and animating cause, and the only cause, of the transfer. If this apprehension so arising, is absent, there is not that contemplation of death intended by the statute, *especially when another adequate motive actuating the gift is shown.*"

Perhaps no case involving transfers alleged to have been made in contemplation of death has been cited so often with approval—and never with disapproval—by other courts and by the Board of Tax Appeals as the case just cited.

In the earlier case of Meyer *v.* United States (60 Ct. Cls. 474) the Court of Claims had occasion to define the term. It did so in this language:

> "A review of the authorities is scarcely necessary to sustain the proposition that the contemplation of death referred to in the statute is not that contemplation of death which must be present with all of us, mindful of its certainty, at some time, we know not when, but it is that state of mind which by reason of advanced age, serious illness, or other producing cause induces the conviction that death in the near future is to be anticipated. If it be said that there need not be a conviction that death is imminent, there must at least be a belief that it is to be expected in the very near future rather than in the usual course of events. And in this state of mind, in this belief in the near approach of death, must be found the motive for the conveyance if it is properly to be characterized as made in the contemplation of death."

In State *v.* Thompson, 154 Wis. 320, the Supreme Court of Wisconsin thus discusses the rule on this subject:

> "An act is not done in contemplation of death when the feeling that dissolution is approaching is absent and is not the cause which impels or prompts the doing of the act. An aged person in good health who has acquired a competence and who desires to retire from active life may desire to distribute a portion of his accumulations among his children without any thought of impending death. He may derive genuine enjoyment from seeing them enjoy the

fruits of his accumulations if they put them to good use and may take pleasure in giving his advice or counsel as to how the business or property turned over should be managed or handled. "The question of whether such a person may have a few or many years to live is not a consideration that has entered into or affected the transaction. He does not give because he is anticipating death, but because it affords him a pleasure in life."

Even though it be found by the Court that objection may properly be made to some portion of the definition of the term "contemplation of death" it would not follow, we suggest, that the judgment appealed from should be reversed.

It was not claimed in the petition for certiorari that the finding of ultimate fact, *i. e.*, that the gifts were not made in contemplation of death, was not supported by the primary facts found by the lower court. The sole error complained of in the petition related to the court's definition of "contemplation of death."

If this case had originated in the United States District Court and there had been a verdict of no contemplation of death by a jury, the error assigned might turn upon the trial court's interpretation of the law in its charge to the jury. It is, however, a well settled rule that even in cases of that sort, it is a complete answer to show that the error, if made, was not prejudicial. So, in the present case, we suggest that if any portion of the definition be objectionable the further inquiry should be made as to whether the objection-

able portion had any effect upon the finding of ultimate fact by the court below.

It is immaterial in the present case whether the definition of "contemplation of death" may properly include the clause, "a present apprehension * * * creating a reasonable fear that death is near at hand." The findings of fact establish affirmatively that no such apprehension was entertained by the decedent at the time he made any of the gifts involved here. After his discharge from the hospital in September, 1920, and before he departed for California in February, 1921, the decedent, by word of mouth and by letters, expressed the conviction that he was cured of the bowel disease from which he had been a sufferer during the preceding summer. The doctor, in whom he had every confidence, so informed him, advising him, however, as a precautionary measure, to be careful of his diet. On January 26, 1921, which was immediately after the latest gifts were consummated, the decedent penned these words to his son Ralph, "The doctors pronounce me cured of bowel trouble * * *."

We confidently submit that there was no primary fact from which an inference could have been drawn that in December, 1919, December, 1920, or January, 1921 (the pivotal months of the present case), the decedent had the slighest apprehension that his death was "near at hand."

The same conclusion is to be reached regarding the second assignment of error in the petition for certiorari, which asserts error in the use and in the definition of the clause, "it must be the direct or animating cause and the only cause of the transfer." The mo-

tivating cause of the transfers in the present case was shown affirmatively to have been something other than contemplation of death.

For the transfers of December, 1919, the cause was shown to have been the desire to give to the son Artemus a larger interest in the business he was managing.

For the transfers made in December, 1920, January, 1921, the motivating cause was the decision on the part of the decedent to equalize his children in his gifts to them, in his lifetime, so that he might counsel with them as to the investment and use of the property entrusted to them. This decision by the decedent was reached and carried out after he had been assured by his attending physician that he had fully recovered from the ulcerative colitis attack of the preceding summer, and after he had resumed his normal business activities and was planning his customary winter trip to California.

These were the findings of fact relating to the motivating cause of the transfers; and it is entirely clear that contemplation of death was neither the sole nor one of the contributing causes thereof. This being true, we suggest that the clause of the definition relating to causation had no influence upon the decision of the lower court, and therefore could not have been prejudicial to petitioner in the present case.

Our view is that:

(*a*) There is no conflict between the finding of ultimate fact and any of the findings of primary facts;

(*b*) The finding of ultimate fact of no contemplation of death irresistibly follows from the findings of primary facts made by the court below;

(*c*) The court below inevitably would have made the same finding of ultimate fact if there had been no consideration of the case of Rea *v.* Heiner, Collector, 6 Fed. (2d) 389, from which the definition of "contemplation of death" complained of was taken.

Perhaps it may not be out of place to conclude this discussion with a reference to two or three decisions of this court as additional illustrations of its attitude toward findings of fact, primary and ultimate, of the Court of Claims.

In the case of Hathaway *v.* United States, 249 U. S. 463, the question before the Court of Claims was whether the delay of the contractor had been excused by the delay of the Government. The decision was in favor of the Government. On appeal, this Court said:

> "The court of claims found: 'There was no unreasonable delay on the part of the government in approving the contract.' This finding, like one of reasonable value (Talbert *v.* United States, 155 U. S. 45, 46, 39 L. ed. 64, 15 Sup. Ct. Rep. 4), is a finding of an ultimate fact by which this court is bound, unless it appears that the finding was made without supporting evidence (William Cramp & Sons Ship & Engine Bldg. Co. *v.* United States, 239 U. S. 221, 232, 60 L. ed. 238, 242, 36 Sup. Ct. Rep. 70; Stone *v.* United States, 164 U. S. 380, 41 L. ed. 477, 17 Sup. Ct. Rep. 71; United States *v.* Clark, 96 U. S. 37, 24 L. ed. 696), or is inconsistent with other

facts found (United States *v.* Berdan Fire-Arms Mfg. Co., 156 U. S. 552, 573, 39 L. ed. 530, 537, 15 Sup. Ct. Rep. 420)."

Similarly, in the case of Ley & Company *v.* United States, 273 U. S. 387, this Court held:

> "It is urged that the records in those cases show a blanket approval by the government of the expenditures made for liability insurance in the construction of all the Army cantonments. But the court of claims specifically found that there was no evidence that the present expenditure was required or approved. By that finding we are concluded."

We also cite the decision of this Court in Saalfield, Adm'r of Brown *v.* United States, 246 U. S. 612. The annotations of this decision in 62 Law Ed. 895 *et seq.* collate all earlier rulings on the question of the conclusiveness of the findings of fact of the Court of Claims on appeals to this Court.

For these reasons we respectfully ask for an affirmance of the decision of the Court of Claims in the present case.

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